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Nos. 85-1239 and 85-1406

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

DONALD P. HODEL, SECRETARY OF THE INTERIOR, et al., Petitioners,

AMOCO PRODUCTION COMPANY, et al., Petitioners,

v.

PEOPLE OF THE VILLAGE OF GAMBELL, et al., Respondents.

BRIEF AMICUS CURIAE OF THE STATE OF ALASKA

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BRIEF AMICUS CURIAE OF THE STATE OF ALASKA

This brief is in support of respondents People of the Village of Gambell, et al. Under Supreme Court Rule 36.4, written consent of the parties is not required.

INTEREST OF THE STATE OF ALASKA

This suit concerns the applicability of section 810 of the Alaska

National Interest Lands Act (ANILCA), 1/ 16 U.S.C. § 3120, to Federal oil leasing activities on the Outer Continental Shelf (OCS) in Alaska. It further concerns the proper injunctive standard for a district court faced with an apparent substantial violation of that section. Section 810 of ANILCA requires a federal agency to consider the impact of land use decisions upon the subsistence uses and needs of the many rural Alaskans who are dependent on subsistence for their livelihood.

Alaska did not, and does not, oppose the Federal lease sales at issue in this litigation (OCS Lease Sale 83,

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1/ Act of Dec. 2, 1980, Pub.L.No. 96-487, 94 Stat. 2371, codified at 16 U.S.C. § 3101 et seq.

in the Navarin Basin and OCS Lease Sale 57, in Norton Sound). However, Alaska does oppose OCS Lease Sale 92, in the North Aleutian Basin (Bristol Bay). This latter sale was enjoined on the basis of the Ninth Circuit's holding in this case. Parties to the Bristol Bay litigation are currently seeking this Court's review of that injunction. Hodel v. Akutan, Nos. 86-303 and 86-304, (9th Cir. filed Aug. 26, 1986).

The Ninth Circuit correctly held that the procedural protections of section 810 of ANILCA apply to activities in the OCS; that these procedural requirements must be complied with prior to the decision to lease; and that an injunction is, absent unusual circumstances, the appropriate remedy when the requirements are not met. Because this Court's decision herein may well

dispose of the questions in the Bristol Bay litigation, to which Alaska is a party, the State of Alaska submits this brief to assist the Court in its resolution of these issues.

Alaska joins with the State of California, along with other amici, in its brief on the injunctive standard issue and does not separately address that issue in this brief. Alaska herein addresses the ANILCA issues.

ARGUMENT

A. SECTION 810 OF ANILCA APPLIES TO LEASING IN THE OCS

The Ninth Circuit has twice held that the Alaska Native Claims Settlement Act (ANCSA) 2/ applies in the

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2/ Act of Dec. 18, 1971, Pub.L.No. (Footnote Continued)

Outer Continental Shelf in Alaska, and by its terms extinguished all aboriginal rights, including hunting and fishing rights, therein. Inupiat Community of the Arctic Slope v. United States, 746 F.2d 570 (9th Cir. 1984) cert. denied, ___U.S.___, 106 S.Ct. 68 (1985); People of the Village of Gambell v. Clark, 746 F.2d. 572 (9th Cir. 1984). This Court has to date declined review of the Ninth Circuit's holding on this point: certiorari was denied in the Inupiat Community case (___U.S.___, 106 S.Ct. 68 (1985)), and the cross petition on this issue of the respondents in this case, filed in

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(Footnote Continued)
92-203, 85 Stat. 688 codified at 43 U.S.C. § 1601 et seq.

March 1986, has not yet been acted upon. The State of Alaska agrees with the Ninth Circuit that ANCSA was intended to, and did, extinguish all aboriginal claims in Alaska, including claims in the Outer Continental Shelf contiguous to Alaska.

Alaska further agrees with the Ninth Circuit that the strong Congressional policy to protect the subsistence way-of-life embodied in ANILCA can only be effected if ANILCA is construed in pari materia with ANCSA, to afford protection of subsistence resources in the same geographical area that ANCSA extinguished claims.

That Congress' intent was to provide strong protection for the subsistence way of life is evident from the statements of Congressional policy and purpose, from the Congressional

findings, and from the workings of the Act itself. The Act provides that "It is ... the intent and purpose of this Act ... to provide the opportunity for rural residents engaged in a subsistence way of life to continue to do so." 16 U.S.C. § 3101(c). It is the policy of Congress that "the utilization of the public lands in Alaska is to cause the least adverse impact possible on rural residents who depend upon subsistence...." 16 U.S.C. § 3112(1). Congress found that the opportunity for subsistence uses is "essential" to the very "existence" of rural Alaskans, and that "in most cases, no practical alternative means are available to replace the food supplies [provided by] subsistence uses...." 16 U.S.C. § 3111(1),(2).

In the substantive provisions of the Act, Congress took strong steps to implement this policy. The Act provides that subsistence uses of fish and wildlife on public lands "shall be accorded priority" over non-subsistence uses. 16 U.S.C. § 3114. Local participation in fish and game management was established, and the State was required to provide for the subsistence preference on public lands or lose authority to manage those resources. 16 U.S.C. § 3115. The Secretary is required to monitor the implementation of the subsistence preference. 16 U.S.C. § 3116. Subsistence commissions were established in the national parks and monuments to devise programs for subsistence hunting within those units. 16 U.S.C. § 3118. Finally, and the subject of this litigation, the Act

directs federal agencies to evaluate the effect on subsistence of land use decisions, including the decision to "lease." 16 U.S.C. § 3120.

Taken together, these provisions indicate that Congress found that the subsistence way-of-life needed protection, and that Congress intended to protect it.

The provision of ANILCA that is at issue provides:

> In determining whether to withdraw, reserve, lease, or otherwise permit the use, occupancy, or disposition of public lands ... the head of the Federal agency having primary jurisdiction over such lands or his designee shall evaluate the effect of such use, occupancy, or disposition on subsistence uses and needs ....

16 U.S.C. § 3120(a). The petitioners take the position that an oil and gas lease in the OCS is not a disposition

of "public lands" within the meaning of this section.

The term "public lands" is defined in ANILCA to mean "land[s] situated in Alaska which ... are Federal lands ...." The term "Federal land" is in turn defined as "lands the title to which is in the United States ...," and "land" means "lands, waters and interests therein." 16 U.S.C. § 3102. By combining the pertinent portions of the three definitions, the "public lands" to which ANILCA applies can be read to be "lands, waters and interests therein, situated in Alaska, the title to which is in the United States."

The oil companies and the United States encourage this Court to read this language not as it stands, but with substantial and substantive changes. According to them, the term

"public lands" is defined to mean "lands [WATERS AND INTERESTS THEREIN], situated in the State of Alaska, the formal, fee simple title to which is in the United States."

By omitting "waters, and interests therein" and including a requirement for formal, fee simple title, petitioners are able to rely on authority for the fact that the United States does not "own" the OCS. The parties do not dispute that the United States does not claim full legal title to the OCS in its entirety. But this lawsuit would not have arisen if the United States did not claim something in the OCS: this suit concerns the leasing of Federal oil and gas in the OCS. The oil companies do not claim that they may produce oil in the OCS without a lease from the United States.

While the United States does not claim all of the attributes of ownership in the OCS, it most assuredly does claim, as the brief for the United States points out, "sovereignty over the exploration and development of the natural resources on and within the OCS." Brief for the Federal Petitioners, quoting the Report of the House Committee on Merchant Marine and Fisheries on the 1985 OCSLA amendments. As the leases underlying this litigation exemplify, that sovereign claim includes the power to sell or otherwise dispose of those interests. Indeed, "interests" in the OCS are precisely what the United States does claim: full, complete and exclusive ownership of the natural resources (including mineral interests) found there.

The briefs of the United States and the oil companies are less than candid in their omission of any discussion of the words "waters, and interests therein" in ANILCA's definition of lands. The plain meaning of these words is that whatever the United States "has" is included within the ambit of the statute. The State submits that, where a sovereign is concerned, the power to dispose of a real property interest evidences sovereign "title" to that interest. 3/

3/ 43 U.S.C. § 1333(a)(1) provides, in part, that "The ... jurisdiction of the United States [is] hereby extended to the subsoil and seabed of the outer Continental Shelf ... to the same extent as if the outer Continental Shelf were an area of exclusive Federal jurisdiction located within a State ...." In Guess v. Read, 290 F.2d 622 (Fifth Cir. 1961), cert. denied 368

(Footnote Continued)

Since it is not disputed that oil and gas in the OCS must be leased from the United States, it cannot be disputed that the United States has title to those interests.

Even if the United States has title to natural resources in the OCS, petitioners argue that leases of those resources are outside the reach of ANILCA because they are not "situated in Alaska." They would change those words to read "situated in the State of Alaska," thus limiting ANILCA's application to the formal State boundaries within three miles of shore.

(Footnote Continued)
U.S. 957 (1962) the court held that the "Continental Shelf Act was enacted for the purpose, primarily, of asserting ownership of and jurisdiction over the minerals in and under the Continental Shelf. 290 F.2d at 625.

ANILCA uses the term "Outer Continental Shelf" only once. 16 U.S.C. § 3141(a). That section directs the Secretary to "initiate and carry out a study of all Federal lands (other than submerged lands on the Outer Continental Shelf) in Alaska ...." The inference to be drawn from the use of this language in this section is that absent the parenthetical statement, the Secretary's study would have included the OCS. Since the language is used in no other provision in ANILCA, the conclusion should be drawn that the term "Federal lands" (and thereby the term "public lands") includes the OCS unless Congress has specifically stated otherwise. Congress has evidenced, by section 3141(a), that when it wishes to exclude the OCS it does so.

The words "in Alaska" are commonly understood to mean not only the land and waters within the three mile limit, but also those waters contiguous to the State. Many a Seattle fisherman heads north each summer to fish "in Alaska" even though almost all of his activity takes place outside three miles. See, e.g., Sjong v. State of Alaska Dep't of Revenue, 622 P.2d 967 (Alaska 1981), appeal dismissed, 454 U.S. 1131 (1982). The term "exempt Alaskan oil" in the Crude Oil Windfall Profit Tax Act (26 U.S.C. § 4991(b)(3)) includes oil produced in parts of the OCS off the state. U.S. v. Ptasynski, 462 U.S. 74, 77-78 (1983).

The words "in Alaska" commonly connote the waters contiguous to the state. Congress has evidenced its ability to exclude the OCS from the

reach of ANILCA when it intends to do so. Section 810 of ANILCA applies to the OCS because Congress did not specifically exclude it.

This construction is consistent with the Congressional purposes. Congress, quite simply, intended to protect the subsistence way of life. Congress enacted a subsistence preference for fish and wildlife on federal lands. Congress strongly encouraged the State to enact a subsistence preference by providing that unless the State adopted such a law, fish and game on federal lands would be managed by the United States. Because the subsistence resources upon which rural Alaskans rely do not respect arbitrary political boundaries either on land or at sea, the State's subsistence plan applies to both Federal and State waters and

lands. 4/ Congress stated that "the utilization of the public lands in Alaska is to cause the least adverse impact possible on rural residents who depend upon subsistence...."

Viewed in the light of the Congressional purposes, it is inconceivable that Congress intended to abandon its concern for subsistence at the three mile line. The Act as a

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4/ The State's fishing laws apply both in State waters and in the OCS. If it becomes necessary to limit commercial and sport harvesting of fishery resources in order to protect subsistence, the State limits those activities both within and without the three-mile limit. For example, the State closed waters to the taking of king crab in Norton Sound and around St. Lawrence, King and Little Diomede Islands. The waters were closed to protect subsistence harvest; the closures extend beyond the three-mile limit. 5 Alaska Administrative Code 34.935.

whole evidences a Congressional commitment that the United States will not unduly interfere with subsistence. Congress can not have intended that Federal oil leasing activities on land, where an oil spill can be fairly easily contained, must be undertaken only after an analysis of subsistence impacts, but at the same time that Federal activity which could have devastating effects on subsistence could take place just outside the three-mile limit with no regard for subsistence impact.

Finally, "in Alaska" must be construed to include the OCS in ANILCA because the phrase has been properly construed to include the OCS in ANCSA. ANCSA was intended to, and did, extinguish all aboriginal claims in Alaska. Many of those claims are based on

traditional hunting and fishing activities on the sea and on the sea ice in the coastal areas, that took, and take place without regard for the arbitrary three-mile limit. ANCSA was intended to be a fair and equitable settlement of all aboriginal claims. To conclude that Congress intended only to extinguish claims out to the three mile limit would be, as the State, the United States, the oil companies and the Ninth Circuit all agreed, "inconceivable." See, Brief for the United States in Opposition at 7, Inupiat Community of the Arctic Slope v. United States, No. 84-1801, July 1985.

When ANCSA was passed in 1971, Congress recognized that the transfer of land to the Natives was neither sufficient to nor intended to fully pro-

tect traditional subsistence activities. As the Ninth Circuit noted, the Senate version of ANCSA "included provisions directing the Secretary to protect subsistence uses on public lands." 746 F.2d at 580. Although the provisions were eliminated in conference, the committee report provided that the Committee "expects both the Secretary and the State to take any action necessary to protect the subsistence needs of the Natives." Id.

It was hoped that federal and state land and wildlife managers would provide sufficient subsistence opportunity without further legislation. By 1980, Congress was of the opinion that this hope was misplaced. As a result, and in conjunction with passing the national interest lands legislation

provided for in ANCSA (see 43 U.S.C. § 1616(d)), Congress adopted the strong subsistence protection of ANILCA. The two statutes are truly sister statutes, and must be construed, as the Ninth Circuit has held, in pari materia.

B. THE SECRETARY MUST COMPLY WITH SECTION 810 OF ANILCA PRIOR TO LEASING

The gravamen of section 810 is that a federal agency must consider the effects on subsistence of proposed federal action in the decision-making process. Like the studies required by the National Environmental Policy Act (NEPA), 5/ the purpose of the section 810 analysis is to give the decision

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5/ 83 Stat. 852, 42 U.S.C. § 4321 et seq.

maker the best information on which to base the decision. Also like NEPA, while ANILCA section 810 is based on "significant substantive goals," its protections are "essentially procedural." Vermont Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519, 558 (1978). Once the procedural requirements have been met, ANILCA provides that the agency may "manage or dispose of public lands ... for any of those uses or purposes authorized by ... law." 16 U.S.C. § 3120(d).

Congress declared that it was its policy that public lands be utilized so as to "cause the least adverse impact possible on ... subsistence uses ...." 16 U.S.C. § 3112(1). Congress wanted rural residents to have a meaningful role in decisions that might affect subsistence. 16 U.S.C. § 3111(5);

§ 3112(3). In furtherance of these policies, Congress provided that "[i]n determining whether to ... lease ... public lands" the Secretary must evaluate the effect of the action on subsistence, and must consider alternatives. Whenever the proposed Federal action threatens subsistence activities, the Secretary must give notice to the State and to subsistence groups, must notice and hold hearings, and must determine that a restriction of subsistence is necessary, that the minimal amount of lands necessary are involved, and that reasonable steps will be taken to minimize impacts on subsistence. 16 U.S.C. § 3120(a).

The clear terms of the section require the Secretary is to fully consider subsistence in deciding whether to lease. A hypothetical will serve to

illustrate the point. If the Secretary were faced with the choice of leasing one of two tracts, and the tracts were identical in their oil potential, and the projects as a whole would have the identical environmental impacts, but production from one tract would impact subsistence while production from the other tract would not, section 810 encourages the Secretary to choose the tract with no impact on subsistence.

The Secretary argues that the notice and hearing requirements of section 810 are not triggered at the lease sale stage if the impact on subsistence would not occur until the production stage. But this construction of section 810 would render the inclusion of the word "lease" in the section meaningless. For the mere act of leasing cannot, in and of itself, have an impact

on subsistence. ANILCA was enacted after the 1978 amendments to the OCS Leasing Act. As this court has noted, those changes clarified that "the purchase of a lease entitles the purchaser only to priority over other interested parties in submitting for federal approval a plan for exploration, production, or development." Secretary of Interior v. California, 464 U.S. 312, 337 (1984). Since leasing, in and of itself, cannot impact subsistence, Congress must have intended that the Secretary's consideration of subsistence impact extend to the project as a whole.

In concluding that notice and hearing can be delayed until the production stage, petitioners rely on this Court's holding in Secretary of Interior v. California. That case

examined the need, at the lease sale stage, for a coastal zone consistency determination under section 307(c)(1) of the the Coastal Zone Management Act (CZMA). 6/ The word "lease" was not in that Act, and this Court found that Congress had expressly omitted it. 464 U.S. at 334. "It is surely not for us to add to the statute what Congress twice decided to omit." Id. at 334-335. Here, Congress has specifically included the word "lease," and it is just as surely not for this Court to read out of the statute a word that Congress has specifically chosen to include.

6/ 86 Stat. 1285, 16 U.S.C. § 1456(c)(1).

Where the objective of the statute is to provide good information to aid in reasoned decision making, courts have required that the project be examined in its entirety rather than piecemeal. See, e.g., North Slope Borough v. Andrus, 642 F.2d 589 (D.C. Cir. 1980); Commonwealth of Massachusetts v. Watt, 716 F.2d 946 (1st Cir. 1983); Conservation Law Foundation v. Andrus, 623 F.2d 712 (1st Cir. 1979); Commonwealth of Massachusetts v. Andrus, 594 F.2d 872 (1st Cir. 1979); County of Suffolk v. Secretary of the Interior, 562 F.2d 1368 (2d Cir. 1977), cert. denied, 434 U.S. 1064 (1978); Sierra Club v. Morton, 510 F.2d 813 (5th Cir. 1975); Village of False Pass v. Clark, 733 F.2d 605 (9th Cir. 1984). The rationale for this rule is evident:

the earlier in a project that potential problems can be identified, the easier it is to avoid them. If local input is not sought until the production stage, it is too late for the Secretary to use that information "in determining whether to lease."

This Court's analysis in Secretary of the Interior v. California leads directly to the conclusion that section 810 must be complied with at the lease sale stage. In that case, the Court looked first to the language of the statute, and second to the purposes of the Act. Since the word "lease" was intentionally omitted from the statute, and since the purposes of the Act could be accomplished if compliance were delayed, the Court concluded that compliance was not required at the leasing stage. Here, the word "lease"

expressly appears in the statute; here, the overall objectives of the Act are met if compliance is required at leasing.

Finally, petitioners argue that compliance with the notice and hearing requirements is not necessary unless the Secretary is certain that subsistence input will occur. This reading of the Act is illogical, inconsistent with the purposes of the Act, and not supported by law. Particularly with respect to oil and gas activities, the risks of a prcject are of critical importance. Presumably, if the Secretary were certain that a major oil spill would occur under certain circumstances, he would not permit the activity under those circumstances. The Secretary's construction of the Act might obviate the need for subsistence

analysis even at the production stage and even in the face of the risk of devastating spills, as long as the occurrence of the spills were not "certain."

The Secretary cannot ensure that "utilization of the public lands in Alaska is to cause the least adverse impact possible on ... subsistence" unless he examines all the potential ramifications of his action in the light of the impact on subsistence. Rural residents cannot have a "meaningful role" in land use decisions if the certainty, rather than the threat, of impact is required.

The Ninth Circuit's conclusion that section 810's notice and hearing requirements are triggered whenever the proposed activity "may" significantly impact subsistence is fully supported

by case law. The language in section 810 -- "[N]o such [action] which would significantly restrict subsistence uses" -- is nearly identical to NEPA's requirement of an impact statement for any "major Federal actions significantly affecting" the human environment. 42 U.S.C. § 4332(2)(C). This phrase means that the agency must show there is "no substantial possibility that [the activity] could significantly affect the quality of the human environment." Quinonez-Lopez v. Coco Lagoon Development Corp., 733 F.2d 1, 2 (1st Cir. 1984). See also, Foundation for North American Wild Sheep v. United States Dep't of Agriculture, 681 F.2d 1172, 1177-78 (9th Cir. 1982)(whether the proposed activity "may significantly degrade"); Columbia Basin Land Protection Ass'n v. Schlesinger,

643 F.2d 585, 597 (9th Cir. 1981)(same); Minnesota Public Interest Research Group v. Butz, 498 F.2d 1314, 1320 (8th Cir. 1974)(whether "the project could significantly affect"); Save Our Ten Acres v. Kreger, 472 F.2d 463, 467 (5th Cir. 1973)(if "the project may cause a significant degradation"). This case law is fully applicable to section 810 because the purpose of the procedural requirements of notice and hearing is to aid in the decision making process.

CONCLUSION

The decisions of the court of appeals that section 810 applies to

Federal actions in the OCS and that compliance is required at the lease sale stage should be affirmed.

Respectfully submitted,

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